Supreme Court U.S.
FILED

Docket No. 981377 FEB 26 '99

OFFICE OF THE CLERK

UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

JAMES M. ROBERTSON, M.D. and VICTORIA ROBERTSON

Petitioners,

v.

THE NEUROMEDICAL CENTER, THOMAS B. FLYNN, JOHN R. CLIFFORD, ANTHONY S. IOPPOLO, ALLEN S. JOSEPH, THOMAS P. PERONE, L. ALLEN PROCTOR, OSCAR L. ROGERS, III, CAROLYN C. BAKER, SUSAN L. SCARBERRY and BARBARA J. GOLDEN

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES E. BOREN, ESQ.
COUNSEL OF RECORD
Suite A
830 Main Street
Baton Rouge, LA 70802
(225) 387-5786

MARY OLIVE PIERSON, ESQ.
Suite 101
5757 Corporate Blvd.
Baton Rouge, LA 70808
(225) 927-6765

97188

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, AS A MATTER OF LAW, THERE ARE NO REASONABLE ACCOMMODATIONS THAT WOULD ALLOW A LICENSED AND PRACTICING NEUROLOGIST, SUBSEQUENTLY DIAGNOSED WITH ATTENTION DEFICIT HYPERACTIVITY DISORDER, TO CONTINUE TO PERFORM THE ESSENTIAL FUNCTIONS OF HIS CHOSEN PROFESSION?

II. WHETHER, AS A MATTER OF LAW, A PERSON DIAGNOSED WITH ATTENTION DEFICIT HYPERACTIVITY DISORDER IS PRECLUDED FROM PRACTICING MEDICINE BECAUSE THEY ALLEGEDLY POSE A DIRECT THREAT TO THE HEALTH OR SAFETY OF OTHERS?

III. UNDER THE AMERICANS WITH DISABILITIES ACT, CAN AN EMPLOYER REFUSE TO EVEN ATTEMPT SPECIFIC ACCOMMODATIONS PROPOSED BY MEDICAL EXPERTS SOLELY ON THE BASIS OF AN ASSUMPTION THAT ANY ACCOMMODATION WOULD IMPOSE AN UNDUE HARDSHIP ON THE EMPLOYER AND WOULD NOT ELIMINATE ANY ALLEGED DIRECT THREAT TO THE HEALTH OR SAFETY OF OTHERS?

IV. WHETHER, IN AN AMERICANS WITH DISABILITIES ACT CASE INVOLVING A LICENSED PHYSICIAN DIAGNOSED WITH ATTENTION DEFICIT HYPERACTIVITY DISORDER, THE FOLLOWING ARE GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT: (A) DETERMINING THE ESSENTIAL FUNCTIONS OF A NEUROLOGIST; (B) WHETHER A PERSON CAN PERFORM THOSE FUNCTIONS WITH ACCOMMODATIONS; (C) WHAT ACCOMMODATIONS FOR A NEUROLOGIST ARE REASONABLE; AND (D) WHETHER A PERSON POSES A DIRECT THREAT TO THE HEALTH OR SAFETY OF OTHERS ONCE THE REASONABLE ACCOMMODATIONS ARE IN PLACE?

LIST OF ALL PARTIES

The following is a list of all named parties in the action below:

James M. Robertson, M.D. - Appellant;

Victoria Robertson - Appellant;

The Neuromedical Center - Appellee;

Thomas B. Flynn - Appellee;

John R. Clifford - Appellee;

Anthony S. Ioppolo - Appellee;

Allen S. Joseph - Appellee;

Thomas P. Perone - Appellee;

L. Allen Proctor - Appellee;

Oscar L. Rogers, III - Appellee;

Carolyn C. Baker - Appellee;

Susan L. Scarberry - Appellee; and,

Barbara J. Golden - Appellee.

The only parties in the action below that are named parties to this Petition for Writ of Certiorari are:

James M. Robertson, M.D. - Petitioner;

Victoria Robertson - Petitioner; and,

The Neuromedical Center - Respondent.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
LIST OF ALL PARTIES iii
TABLE OF CITED AUTHORITIES viii
PREVIOUS OPINIONS 1
STATEMENT OF JURISDICTION 2
STATUTES AND REGULATIONS INVOLVED 3
STATEMENT OF THE CASE 4
I. FACTUAL BACKGROUND 4
II. PROCEDURAL HISTORY 6
III. REASONS FOR GRANTING THE WRIT 8
ARGUMENT 9
I. WHETHER, AS A MATTER OF LAW, THERE ARE NO REASONABLE ACCOMMODATIONS THAT WOULD ALLOW A LICENSED AND PRACTICING NEUROLOGIST, SUBSEQUENTLY DIAGNOSED WITH ATTENTION DEFICIT HYPERACTIVITY DISORDER, TO CONTINUE TO PERFORM THE ESSENTIAL FUNCTIONS OF HIS CHOSEN PROFESSION? 9
II. WHETHER, AS A MATTER OF LAW, A PERSON DIAGNOSED WITH ATTENTION DEFICIT HYPERACTIVITY DIS-

ORDER IS PRECLUDED FROM PRACTICING MEDICINE BECAUSE THEY ALLEGEDLY POSE A DIRECT THREAT TO THE HEALTH OR SAFETY OF OTHERS? 12

III. UNDER THE AMERICANS WITH DISABILITIES ACT, CAN AN EMPLOYER REFUSE TO EVEN ATTEMPT SPECIFIC ACCOMMODATIONS PROPOSED BY MEDICAL EXPERTS SOLELY ON THE BASIS OF AN ASSUMPTION THAT ANY ACCOMMODATION WOULD IMPOSE AN UNDUE HARDSHIP ON THE EMPLOYER AND WOULD NOT ELIMINATE ANY ALLEGED DIRECT THREAT TO THE HEALTH OR SAFETY OF OTHERS? 16

IV. WHETHER, IN AN AMERICANS WITH DISABILITIES ACT CASE INVOLVING A LICENSED PHYSICIAN DIAGNOSED WITH ATTENTION DEFICIT HYPERACTIVITY DISORDER, THE FOLLOWING ARE GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT: (A) DETERMINING THE ESSENTIAL FUNCTIONS OF A NEUROLOGIST; (B) WHETHER A PERSON CAN PERFORM THOSE FUNCTIONS WITH ACCOMMODATIONS; (C) WHAT ACCOMMODATIONS

FOR A NEUROLOGIST ARE REASONABLE; AND (D) WHETHER A PERSON POSES A DIRECT THREAT TO THE HEALTH OR SAFETY OF OTHERS ONCE THE REASONABLE ACCOMMODATIONS ARE IN PLACE? 20

CONCLUSION 23

APPENDIX 25

I. FIFTH CIRCUIT OPINION

II. DISTRICT COURT'S JUDGMENT SIGNED DECEMBER 3, 1997

III. DISTRICT COURT'S JUDGMENT SIGNED DECEMBER 1, 1997

IV. DISTRICT COURT'S ORDER AND REASONS

V. STATUTES AND REGULATIONS INVOLVED

VI. LETTER FROM DR. CAVALIER DATED SEPTEMBER 12, 1994

VII. MEMORANDUM TO DR. FLYNN DATED SEPTEMBER 26, 1994

TABLE OF CITED AUTHORITIES

CASES:

Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) 20

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 21

Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998) 8, 14

Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) 20

Robertson v. Neuromedical Center, 161 F. 3d 292 (5th Cir. 1998) 1, 8, 9-10

STATUTES and REGULATIONS:

28 U.S.C. § 1254 2

28 U.S.C. § 1331 6

28 U.S.C. § 1441(c) 6

28 U.S.C. § 1446(b) 6

42 U.S.C. § 2000e-5(f)(3) 6

42 U.S.C. § 12101, *et seq.* 6, 8

42 U.S.C. § 12101(b)(1) 16, 20

42 U.S.C. § 12102(2) 9

42 U.S.C. § 12102(9)(B) 10

42 U.S.C. § 12111(3) 12, 16

42 U.S.C. § 12111(8) 16

42 U.S.C. § 12112(b)(5)(A) 9, 16

42 U.S.C. § 12113(a) 16

42 U.S.C. § 12113(b) 12, 16

29 C.F.R. § 1630.2(g)-(1) 9

29 C.F.R. § 1630.2(i) 9

29 C.F.R. § 1630.2(j)(1) 9

29 C.F.R. § 1630.2(n) 10, 17

29 C.F.R. § 1630.2(n)(3)(vi) 11, 15

29 C.F.R. § 1630.2(n)(3)(vii) 11, 15

29 C.F.R. § 1630.2(o)(1)(ii) 11

29 C.F.R. § 1630.2(o)(2)(ii) 14

29 C.F.R. § 1630.2(o)(3) 11, 19

29 C.F.R. § 1630.2(p) 16

29 C.F.R. § 1630.2(r) 14-15, 16

29 C.F.R. § 1630.9(a) 9, 16

29 C.F.R. § 1630.15(b) 16

29 C.F.R. § 1630.15(d) 16

Fed. R. App. P. 4 . . . . . 2, 7

Fed. R. Civ. P. 56(b) 6

Fed. R. Civ. P. 56(c) 20

La. Rev. Stat. Ann. § 51:2231, *et seq.* 6

TREATISES:

Diagnostic and Statistical Manual of Mental Disorders (Am. Psych. Ass'n 1994) 4, 12

APPENDICES:

Appendix I 1, 2, 7

Appendix II 1, 2, 7

Appendix III 1, 2, 7

Appendix IV 1, 2

Appendix V 3

Appendix VI 5, 11, 15, 19

Appendix VII 5, 19

PREVIOUS OPINIONS

The citations to the opinions and orders entered in this case, in reverse chronological order, are:

Fifth Circuit affirmed decision of the District Court for the Middle District of Louisiana: *Robertson v. Neuromedical Center*, 161 F. 3d 292 (5th Cir. 1998) (*See* Appendix I).

District Court for the Middle District of Louisiana granted defendants' Motion for Summary Judgment as to the claims arising under the Americans with Disabilities Act and remanded the state law claims to the State court: *Robertson v. Neuromedical Center*, No. 95-1851-A (M.D. La. Dec. 1 & 3, 1997) (*See* Appendices II, III & IV).

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Louisiana granted the defendants' Motion for Summary Judgment on December 1 and 3, 1997. *See* Appendices II, III & IV.

The petitioners filed a timely appeal of right of the adverse decision of the district court on November 10 and December 17, 1997, pursuant to FED. R. APP. P. 4.

The Fifth Circuit affirmed the decision of the District Court for the Middle District of Louisiana on December 3, 1998. *See* Appendix I.

James M. Robertson, M.D. and Victoria Robertson now timely seek a Writ of Certiorari. The only appellee sought to be made a respondent in this matter is The Neuromedical Center.

This Court has jurisdiction to review on a writ of certiorari the judgment in question pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are relevant to the issues in this case and are set-out verbatim in Appendix V:

42 U.S.C. § 12101
42 U.S.C. § 12102
42 U.S.C. § 12111
42 U.S.C. § 12112
42 U.S.C. § 12113
29 C.F.R. § 1630.2
29 C.F.R. § 1630.9
29 C.F.R. § 1630.15

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This is an appeal of the denial of the petitioners' appeal of the district court judgment granting the respondent's Motion for Summary Judgment. The petitioners are not appealing or seeking review of that portion of the Fifth Circuit's ruling affirming the district court judgment remanding the State law claims to State court.

Dr. James M. Robertson had been a successful Neurologist at The Neuromedical Center (NMC) in Baton Rouge, Louisiana, since 1981. He was working under an employment contract with and was a shareholder of NMC, a professional medical corporation.

As his responsibilities at NMC grew and the practice of medicine in general began to require more forms, reports and paperwork, Dr. Robertson began experiencing difficulty with timely completion of the paperwork.

In May of 1994, at the suggestion of one of his colleagues at NMC, Dr. Robertson was tested for and diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). One of the symptoms of ADHD is difficulty with timely completion of administrative reports, routine paperwork and other tasks of this nature. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) pp. 78-85 (Am. Psych. Ass'n 1994). The effects of ADHD can be eliminated with medication and/or environmental accommodations. ADHD is a

neurological disability commonly treated by neurologists and is routinely diagnosed and treated by the neurologists and other neuromedical staff at NMC.

After Dr. Robertson's diagnosis, Dr. Steven Cavalier, a well-respected neurologist practicing at the Baton Rouge Clinic, began treating Dr. Robertson with medication. Dr. Cavalier developed a list of environmental accommodations that he believed would allow Dr. Robertson to continue to practice neurology if the accommodations were implemented. On September 12, 1994, Dr. Cavalier submitted the written plan of reasonable accommodations to NMC. *See* Appendix VI. On September 26, 1994, an ad hoc committee of the Board of NMC met to review these proposed accommodations and "said" it would consider the plan and "said" it would work with Dr. Robertson to reach a positive solution. That same day, four (4) neurologists at NMC wrote a memorandum to the managing partner, Dr. Flynn, stating that they "have decided that a working relationship with [Dr. Robertson] is unfeasible" and threatened to "move our practices elsewhere if it is necessary to continue a working relationship with Dr. Robertson." *See* Appendix VII.

The stated reasons given by the co-workers are clearly derived from and are based upon the symptoms of Dr. Robertson's disability, *i.e.*, "procrastination", "indecision" and "inattention." It cannot be rationally argued that "inattention" is not a symptom of an attention deficit disorder and, therefore, cannot be used to fire a disabled person without violating the letter and the spirit

of the ADA.[1]

Four (4) days later, on September 30, 1994, before any accommodations had been agreed to, implemented or even discussed any further, Drs. Flynn and Perone, two other shareholders of NMC, informed Dr. Robertson that he could either quit or be fired. He refused to quit, so they abruptly changed the locks on his office and locked him out.

II. PROCEDURAL HISTORY

The petitioners originally filed their petition in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, alleging various State law tort and contract claims, violations of the Louisianians with Disabilities Act, LA. REV. STAT. ANN. § 51:2231, *et seq.*, and violations of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* The respondent filed a timely Notice of Removal to the U. S. District Court for the Middle District of Louisiana pursuant to 28 U.S.C. § 1446(b) because the original petition alleges a violation of the ADA. An ADA claim is a civil action over which the U. S. District Courts have original jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3). The respondent also had the pendant State law claims removed to the U.S. District Court pursuant to 28 U.S.C. § 1441(c).

Addressing the respondent's Motion for Summary Judgment filed pursuant to FED. R. CIV. P. 56(b), on

---

1. This is no different than co-workers saying that they will no longer work with a person in a wheel chair because the disabled person cannot get around as fast as a person who can walk.

December 1 and 3, 1997, the district court issued a final judgment disposing of all federal claims and remanding all of the State law claims to State court. *See* Appendices II & III.

Pursuant to FED. R. APP. P. 4, on November 10th and December 17, 1997, the petitioners filed an appeal of right in the U. S. Court of Appeals for the Fifth Circuit seeking reversal of the adverse decision of the district court granting summary judgment dismissing the petitioners' ADA claim. On November 21, December 24 and December 31, 1997, the respondent appealed the district court's remand of the State law claims to State court.

The U. S. Court of Appeals for the Fifth Circuit placed the matter on its Summary Calendar and, on December 3, 1998, affirmed the district court's decision. *See* Appendix I. The Fifth Circuit found as a matter of law that Dr. Robertson was not a "qualified individual" under the ADA because he could not perform the "essential functions" of a neurologist with or without reasonable accommodations and was a "direct threat" to the health or safety of others. Specifically, the court found that administrative duties such as paperwork are an "essential function" of a trained neurologist and that, as a matter of law, there are no reasonable accommodations, such as an assistant, that would allow a neurologist to perform that "essential function." The court also found that no accommodations would eliminate any "direct threat" to the "basic medical safety" of Dr. Robertson's

patients.[2] *Robertson v. Neuromedical Center*, 161 F. 3d 292, 294-296 (5th Cir. 1998).

The petitioners now timely file this Petition for Writ of Certiorari with this Honorable Court.

III. REASONS FOR GRANTING THE WRIT

The Fifth Circuit held that, as a matter of law, a person with ADHD cannot become or continue to be a licensed neurologist.[3] The court determined that it is impossible to implement reasonable accommodations for a physician who has successfully practiced for fourteen (14) years and who is diagnosed with ADHD because accommodations would create an undue hardship on the business and would not eliminate any direct threat to the health or safety of others. *Robertson*, at 295.

This decision involves important questions of federal law that should be resolved by this Court because it conflicts with the plain language and purpose of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*.

This decision also collides with the reasoning of this Court in *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998).

---

2. Unlike most of his colleagues at NMC, in his fourteen (14) years of practice, Dr. Robertson has not been sued for malpractice.

3. How many other medical specialties this logic will affect is limited only by the imagination.

ARGUMENT

I. WHETHER, AS A MATTER OF LAW, THERE ARE NO REASONABLE ACCOMMODATIONS THAT WOULD ALLOW A LICENSED AND PRACTICING NEUROLOGIST, SUBSEQUENTLY DIAGNOSED WITH ATTENTION DEFICIT HYPERACTIVITY DISORDER, TO CONTINUE TO PERFORM THE ESSENTIAL FUNCTIONS OF HIS CHOSEN PROFESSION?

An employer violates the ADA when it fails to make reasonable accommodations to known physical or mental limitations of an otherwise qualified individual. An employer is exempt from the requirements of the ADA if the accommodations pose an undue hardship on the operation of the business. *See* 42 U.S.C. § 12112(b)-(5)(A); 29 C.F.R. § 1630.9(a). A person is disabled under the ADA if they cannot perform a major life activity (*e.g.*, working) or are significantly restricted in the condition, manner or duration that they can perform a major life activity. *See* 42 U.S.C. § 12102(2); 29 C.F.R. §§ 1630.2(g)-(1), -.2(i), -.2(j)(1). The respondent stipulated that Dr. Robertson's ADHD is a disability that substantially limits his ability to work. Therefore, Dr. Robertson is disabled under the ADA. By definition, the respondent must make reasonable accommodations for Dr. Robertson's disability, unless doing so would create an undue hardship.

Using the language of the district court, the Fifth Circuit found that:

"[c]onsidering the limitations on plaintiff's

> abilities caused by ADHD, the type of work he is engaged in, the interests of NMC in running its business,[4] and most importantly, the safety of the patients at NMC . . . plaintiff cannot establish a prima facie case that he could continue in his position as a neurologist because accommodation is not possible in these circumstances." Order and Reasons, October 9, 1997, at 32.

Robertson, at 295.

The Fifth Circuit essentially held that the ADA does not apply to a physician with ADHD because accommodation is impossible as a matter of law. In arriving at its conclusion, the Fifth Circuit and the district court invaded the domain of the jury by weighing the conflicting evidence on the availability of reasonable accommodations.

Dr. Robertson carried the burden of proposing concrete accommodations and establishing that the accommodations were reasonable. *See* 42 U.S.C. § 12102(9)(B); 29 C.F.R. § 1630.2(n). Dr. Cavalier, a neurologist not affiliated with the respondent, developed

---

4. It should be noted that medicine is a profession to render health care services to others. The "business" of NMC is only to make a profit and the profits have been and continue to be significant at NMC.

a list of specific reasonable accommodations.[5] *See* Appendix VI. Dr. Joseph, a neurosurgeon at the respondent, also developed a list of reasonable accommodations. These accommodations were obviously reasonable because other neuromedical professionals familiar with the essential functions of a neurologist developed them. *See* 29 C.F.R. §§ 1630.2(n)(3)(vi) & (vii). However, none of the suggested accommodations on either list was even attempted before Dr. Robertson was fired. There was a complete failure of the required interactive process with Dr. Robertson. It was the respondent, not Dr. Robertson, that was the cause of the breakdown in the interactive process.

Determining whether reasonable accommodations are possible is a function of the jury, after hearing all of the evidence about ADHD and its treatment, the functions of a neurologist and the accommodations

---

5. Reasonable accommodation [means] [m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position.

29 C.F.R. § 1630.2(o)(1)(ii).

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o)(3).

proposed by the medical experts. The Fifth Circuit erred by substituting its opinion of the essential functions of a neurologist for the opinions of the medical experts.

II. WHETHER, AS A MATTER OF LAW, A PERSON DIAGNOSED WITH ATTENTION DEFICIT HYPERACTIVITY DISORDER IS PRECLUDED FROM PRACTICING MEDICINE BECAUSE THEY ALLEGEDLY POSE A DIRECT THREAT TO THE HEALTH OR SAFETY OF OTHERS?

An employer may raise as a defense to an ADA claim that the employee poses "a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). A "direct threat" is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3).

In a deposition taken long after he was terminated, Dr. Robertson stated that before the diagnosis of ADHD, he recognized changes in his behavior that he feared might one day cause harm to a patient.[6] The primary change in his behavior was his lack of ability to concentrate and difficulty organizing tasks, classic effects of ADHD. *See* DSM-IV at pp. 83-85.

Dr. Robertson was unaware of the cause of his condition and he was puzzled and concerned by the effects. This was no longer true after the diagnosis

---

6. The respondent did not know of Dr. Robertson's concerns until the deposition. Therefore, these concerns could not have been a reason for the firing.

because, as a neurologist, he knew that medicine or environmental adjustments could be made that would solve the problem.

Seizing on this testimony about his concerns before the diagnosis, the Fifth Circuit held that, as a matter of law, Dr. Robertson's ADHD made him a direct threat to the health or safety of others, relieving the respondent of its duty to attempt any reasonable accommodations.

The Fifth Circuit's analysis is fatally flawed because it fails to consider the subsequent diagnosis, the treatment and the effect of reasonable accommodations. Without reasonable accommodations, almost every disabled employee can be considered a direct threat to the health or safety of others to some degree. The proper analysis is whether the disabled person would be a direct threat to the health or safety of others after reasonable accommodations are implemented. Dr. Robertson's problem was that the respondent only paid lip service to considering the accommodations and fired him before a single suggestion was implemented.[7] It was improper for the Fifth Circuit to reach an unsupported conclusion that no reasonable accommodations, if implemented, would relieve the direct threat to the health or safety of others.

The Fifth Circuit also erred in relying on the respondent's "belief" that Dr. Robertson posed a direct

---

7. Ironically, just a month before Dr. Robertson was terminated, the respondent determined that it was reasonable to accommodate one of its neurosurgeons, Dr. Ioppolo, by allowing him to stop performing surgery -- which is the first and foremost essential function of a neurosurgeon.

threat to his patients. The alleged "belief" relied on by the respondent is based primarily on the fact that Dr. Robertson was late for appointments, late with paperwork and was not organized. It made no claim, because none could be made, that any of Dr. Robertson's patients were harmed -- ever. A part-time assistant would have solved a majority of the problems Dr. Robertson experienced. *See* 29 C.F.R. § 1630.2(o)(2)(ii). All of the neurosurgeons at the respondent have assistants. The neurologists in general and Dr. Robertson in particular were not treated as well.

Last term, this Court addressed this issue in a public access case and held that an employer's "belief that a significant risk existed, even if maintained in good faith, would not relieve [the employer] from liability." *Bragdon*, 524 U.S. at ___, 118 S. Ct. at 2210, 141 L. Ed. 2d at 564. An employer's belief "receives no special deference simply because [it] is a health care professional." *Bragdon*, 524 U.S. at ___, 118 S. Ct. at 2210, 141 L. Ed. 2d at 564. The employer should consult with "objective third-party experts" and "courts should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments . . . ." *Bragdon*, 524 U.S. at ___, 118 S. Ct. at 2210, 141 L. Ed. 2d at 564-565.[8]

---

8. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical

The respondent presented no third-party medical evidence to support its "belief" that Dr. Robertson posed a direct threat to the health or safety of others.[9] To the contrary, Dr. Cavalier, a neurologist with another group in Baton Rouge, developed a list of reasonable accommodations that would allow Dr. Robertson to continue to practice as a neurologist. *See* Appendix VI. The respondent ignored Dr. Cavalier's recommendations. Likewise, Dr. Joseph, neurosurgeon at the respondent, also developed a list of reasonable accommodations. The respondent also ignored Dr. Joseph's recommendations. *See* 29 C.F.R. §§ 1630.2(n)(3)(vi) & (vii). Surely, if either of these experts believed that Dr. Robertson would be a direct threat no matter what was done, they would not have risked their own reputation and perhaps a malpractice action by suggesting otherwise.

The respondent and the lower courts substituted their own "belief" for the findings of the medical experts.

> judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.

29 C.F.R. § 1630.2(r).

9. The respondent requested and Dr. Robertson agreed to an independent medical examination by a physician selected by the respondent. However, before the examination, the respondent withdrew this request for unknown reasons.

There is no objective medical evidence to support the finding that Dr. Robertson would be a direct threat to others if reasonable accommodations were implemented. Therefore, the courts' findings of fact and conclusions of law based on those findings of fact are clearly erroneous.

III. UNDER THE AMERICANS WITH DISABILITIES ACT, CAN AN EMPLOYER REFUSE TO EVEN ATTEMPT SPECIFIC ACCOMMODATIONS PROPOSED BY MEDICAL EXPERTS SOLELY ON THE BASIS OF AN ASSUMPTION THAT ANY ACCOMMODATION WOULD IMPOSE AN UNDUE HARDSHIP ON THE EMPLOYER AND WOULD NOT ELIMINATE ANY ALLEGED DIRECT THREAT TO THE HEALTH OR SAFETY OF OTHERS?

A purpose of the ADA is "the elimination of discrimination against individuals with disabilities" by requiring employers to make "reasonable accommodations to known physical or mental limitations" of employees. 42 U.S.C. §§ 12101(b)(1) & 12112(b)(5)(A); 29 C.F.R. § 1630.9(a). The ADA allows an employer to take adverse action against a disabled employee if the employee cannot, with reasonable accommodations, perform the essential functions of their position or is a direct threat to the health or safety of others. *See* 42 U.S.C. §§ 12113(a) & (b), 12111(3) & (8); 29 C.F.R. §§ 1630.15(b) & (d), 1630.2(p) & (r).

Dr. Robertson was diagnosed with ADHD and both Dr. Cavalier and Dr. Joseph (a shareholder of respondent) prepared lists of proposed reasonable accommodations,

which were presented to the respondent for discussion. Before the respondent considered the proposed accommodations, much less implemented any of them, it terminated Dr. Robertson.

After determining that completing paperwork is an essential function of a trained and licensed neurologist and that no accommodation would allow Dr. Robertson to perform this essential function, the Fifth Circuit found that Dr. Robertson was not a "qualified individual" under the ADA. In essence, the Fifth Circuit ruled that Dr. Robertson was too disabled to be accommodated.

The real essential function of a neurologist is to use his or her education, training, skill, knowledge and brain power to diagnose neurological problems. *See* 29 C.F.R. § 1630.2(n). A neurologist does not perform surgery and does not have hands-on treatment or contact with patients other than to perform diagnostic tests. Writing reports, filling out insurance forms and organization of his or her time, while important, are not essential. These are functions which can be performed by assistants, secretaries, nurses and paramedicals. A medical degree and specialized training in neurology are not required to perform these functions.

Dr. Robertson's situation is analogous to the essential functions of a Justice.[10] For a Justice, it is his or her education, training, philosophy, wisdom, knowledge and sense of justice and fair play that are essential

---

10. For the sole purpose of this analogy, we assume a Justice would be covered by the ADA.

functions of the position. These qualities and skills allow a Justice to rationally and fairly make decisions which affect the lives and freedom of litigants every day. Suppose a Justice becomes visually impaired. Do we fire him because he cannot read -- an essential function -- or do we get audio equipment and/or hire a reader? Suppose a Justice's opinions are still good and well thought-out but he gets behind in his work, is routinely late and he cannot seem to get organized. Do we fire this Justice or do we get an assistant to help with the administrative work and scheduling? Was the visually impaired Justice elected or appointed because he is a good reader? Was the unorganized Justice elected or appointed for the quality of his work or simply because he could be on time for meetings and would get his work out on time? The answer to both of these questions is obvious and the answer can be applied to Dr. Robertson's situation. Dr. Robertson was not hired because of his organizational skills or because his work would be completed with Swiss precision. Dr. Robertson was hired because of his exceptional ability to diagnose neurological disorders, which he had done successfully for fourteen (14) years.

There is no evidence to support the court's findings because the respondent made no effort to identify, study or implement the proposed accommodations. The court, like the respondent, simply jumped to a conclusion and substituted its opinion for that of the jury.

The ADA requires that an employer engage in an "interactive process" with the employee to determine the

appropriate accommodations.[11] The purpose of the ADA is thwarted when, as in this case, an employer terminates a disabled employee without attempting to even determine or implement reasonable accommodations.

The ADA does not allow an employer to discriminate against a disabled employee, as was done in this case, simply because other employees do not want to work around a disabled person. *See* Appendix VII. If employers can avoid their legal duties under the ADA by simply conducting a popularity contest among employees, then every employer would suggest to their employees that they threaten to quit if the disabled person is not fired, as was perhaps done in this case.

Since at least the Civil Rights Act of 1964, the discriminatory views of the majority are inferior to the rights of the minority. What if Dr. Robertson's co-workers threatened to quit if the respondent did not terminate all blacks, or Catholics, or women, or people in wheel chairs. The respondent would violate the law if it terminated such an employee under these circumstances.

Dr. Robertson is no different. He reported to the respondent that he had been diagnosed with a disabling condition and proposed reasonable accommodations. *See* Appendix VI. Instead of attempting to accommodate Dr. Robertson's disability, the respondent abruptly terminated him after receiving a memorandum from some of the employees threatening to quit if Dr. Robertson was not terminated. This conduct by the respondent violates the

---

11. *See* 29 C.F.R. § 1630.2(o)(3) (quoted *supra* note 5).

mandate of the ADA to protect disabled persons from discrimination. *See* 42 U.S.C. § 12101(b)(1).

IV. WHETHER, IN AN AMERICANS WITH DISABILITIES ACT CASE INVOLVING A LICENSED PHYSICIAN DIAGNOSED WITH ATTENTION DEFICIT HYPERACTIVITY DISORDER, THE FOLLOWING ARE GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT: (A) DETERMINING THE ESSENTIAL FUNCTIONS OF A NEUROLOGIST; (B) WHETHER A PERSON CAN PERFORM THOSE FUNCTIONS WITH ACCOMMODATIONS; (C) WHAT ACCOMMODATIONS FOR A NEUROLOGIST ARE REASONABLE; AND (D) WHETHER A PERSON POSES A DIRECT THREAT TO THE HEALTH OR SAFETY OF OTHERS ONCE THE REASONABLE ACCOMMODATIONS ARE IN PLACE?

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Facts and any reasonable inferences to be drawn from those facts are to be viewed in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 587-88 (1986); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142, 154 (1970).

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202, 212 (1986).

As with the "reasonable jury" standard in the directed verdict context, the inquiry for the "genuine issue" standard in the summary judgment context is:

> whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

The essential functions of a neurologist, what accommodations are reasonable, whether there are any accommodations that will allow Dr. Robertson to perform the essential functions of a neurologist and whether these accommodations will eliminate the direct threat, if any, of ADHD to Dr. Robertson's patients are all highly contested issues of fact. These are genuine issues that are material to a determination of whether the respondent violated the ADA when it abruptly terminated Dr. Robertson.

Dr. Robertson submitted a list of specific accommodations that would allow him to perform the essential functions of his position. By definition, these reasonable accommodations would also eliminate any

direct threat to others, if one existed.

The respondent submitted excerpts of Dr. Robertson's deposition to support its claim that he would be a direct threat to his patients even if reasonable accommodations were implemented. This testimony was that Dr. Robertson feared for the safety of his patients before the diagnosis of ADHD and before he knew what to do to solve the problems. This evidence, which the Fifth Circuit seized upon, is inappropriate for use in the decision because Dr. Robertson's fears were eliminated by the ADHD diagnosis and treatment plan.

In spite of the fact-intensive disputes, the lower courts determined at the summary judgment stage that no accommodations for Dr. Robertson's disability were reasonable because he could not perform the essential functions of a neurologist and that Dr. Robertson was a direct threat to his patients with or without reasonable accommodations.

The nature of this employment action, in general, and the disputed facts in this case, in particular, make summary judgment improper. Whether Dr. Robertson could perform the essential functions of a neurologist; whether the respondent could make reasonable accommodations for Dr. Robertson's disability, without undue hardship, that would allow him to continue his profession as a neurologist; and, whether the reasonable accommodations would eliminate any direct threat that Dr. Robertson may have posed to his patients, are all disputed questions of fact that fall squarely within the province of the jury after determining the credibility of the

witnesses and weighing the evidence. Therefore, justice demands a trial so that Dr. Robertson can prove his case and disprove the self-serving testimony of the respondent.

CONCLUSION

If this decision is allowed to stand, an entire class of persons -- Doctors with ADHD -- is eliminated from the coverage and protection of the ADA. The Fifth Circuit's decision holds that: (1) paperwork and administrative functions are essential to the position of a physician; (2) there are no reasonable accommodations which can be implemented without undue hardship and even if there were no hardship, the "direct threat" cannot be eliminated and (3) physicians are a direct threat to others if they cannot perform administrative tasks properly and in a timely manner.

It was improper for the Fifth Circuit to affirm the district court's decision granting the respondent's Motion for Summary Judgment on the ADA claim because there are genuine issues of material fact as to the nature of the essential functions of a neurologist, whether there were reasonable accommodations that would allow Dr. Robertson to perform those essential functions and whether the reasonable accommodations would eliminate any alleged direct threat to others.

For the foregoing reasons, the petitioners respectfully ask that this Court grant their Petition for Writ of Certiorari and, after due proceedings, reverse the decision of the Fifth Circuit with instructions to remand

the case to the district court for a trial on the merits.

Respectfully submitted,

JAMES E. BOREN
COUNSEL OF RECORD
Suite A
830 Main Street
Baton Rouge, LA 70802
(225) 387-5786

MARY OLIVE PIERSON
Suite 101
5757 Corporate Blvd.
Baton Rouge, LA 70808
(225) 927-6765

Dated: February 24, 1999

APPENDIX

I. FIFTH CIRCUIT OPINION

[161 F.3d 292]

James M. ROBERTSON, M.D. and Victoria Robertson, Plaintiffs-Appellants-Cross-Appellees,

v.

THE NEUROMEDICAL CENTER, Thomas B. Flynn, John R. Clifford, Anthony S. Ioppolo, Allen S. Joseph, Thomas P. Perone, L. Allen Proctor, Oscar L. Rogers, III, Carolyn C. Baker, Susan L. Scarberry, and Barbara J. Golden, Defendants-Appellees-Cross-Appellants.

No. 97-31169.

United States Court of Appeals,
Fifth Circuit.

Dec. 3, 1998.

Appeal from the United States District Court for the Middle District of Louisiana.

Before DAVIS, DUHE and PARKER, Circuit Judges.

*294 PER CURIAM:

Plaintiffs-Appellants ("the Robertsons") sued the Defendants-Appellees, (collectively, "the NMC") under the

Americans with Disabilities Act of 1990 ("the ADA"), as well as other state-law claims, alleging that the NMC had discriminated against Dr. Robertson in firing him. Robertson claims that the NMC failed to make reasonable accommodations for his Attention Deficit Hyperactivity Disorder ("ADHD"). The district court entered summary judgment in favor of the defendants on the claims under the ADA, but remanded the Robertsons' state-law claims, including a claim under the Louisianians with Disabilities Act ("the LDA"), back to state court for further proceedings. The Robertsons now appeal from the grant of summary judgment, and the NMC appeals from the remand of the state-law claims. For the following reasons, we affirm.

I. Background and Procedural History

Plaintiff, Dr. James Robertson, had been a neurologist at the NMC in Baton Rouge since 1981. He was a shareholder in the NMC Corporation and was working under an employment contract until the time of his termination. In May 1994, at the suggestion of one of his colleagues, Robertson was tested and diagnosed with ADHD. Approximately four months later, he was terminated from his employment with the NMC. Robertson contends that he was wrongfully discharged because of his diagnoses of ADHD and that reasonable accommodations were recommended, but never implemented. The NMC contends that certain of Robertson's work-related problems predated his diagnosis of ADHD, and that those problems resulted in his termination "for cause" as provided in his employment

contract.

Originally filed in Louisiana state court, the Robertsons filed suit against the NMC and various individual doctors alleging violations of the ADA as well as a similar claim under the LDA and other state-law causes of action. Later, the NMC removed the case to federal court on the basis of the ADA claim. Upon a motion filed by the NMC, the court granted summary judgment on the ADA claim, finding that no genuine issue of material fact existed on whether Dr. Robertson was a "qualified individual" able to recover under the ADA. Declining to exercise supplemental jurisdiction over the remaining state-law claims, the district court remanded them back to state court for further proceedings.

II. Discussion

After reviewing the record before us and the applicable law, we conclude that the district court's grant of summary judgment on behalf of the NMC should be affirmed.

In reviewing the district court's grant of summary judgment, questions of fact are viewed in the light most favorable to the non-movant and questions of law are reviewed de novo. See Deas v. River West, L.P., 152 F.3d 471, 475 (5th Cir. 1998). As this court has stated in Hypes v. First Commerce Corp., "[i]f plaintiff lacks evidence sufficient to create a genuine issue of fact in support of a necessary element of a claim or claims, then summary judgment is appropriate against plaintiff on that claim." 134 F.3d 721, 725 (5th Cir. 1998) (citing Fed. R. Civ. P. 56(c)).

Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees . . . and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (1994). To establish a prima facie case of discriminatory firing, a plaintiff must prove: (1) he has a "disability;" (2) he is a "qualified individual" for the job in question; and (3) an adverse employment decision was made because of his disability. See id.; Hamilton v. Southwestern Bell Telephone Co., 136 F.3d 1047, 1049 (5th Cir. 1998).

A. Was Dr. Robertson a "Qualified Individual" Under the ADA?

The basis on which the district court granted summary judgment in this case was because the plaintiffs, as a matter of law, could not prove that Dr. Robertson was a "qualified individual" with a disability--that is, one who can perform the essential functions of his job with or without reasonable ***295** accommodations. See 42 U.S.C. § 12111(8). Dr. Robertson contends that either the administrative portions of his job were not "essential functions" as defined under the Act, or even if they were, he would have been able to perform them with the aid of reasonable accommodations.

After a review of the record, we conclude that the "administrative portion" of Dr. Robertson's job is unquestionably one of its essential functions. Contrary to the Robertson's blatant attempt to minimize its importance, we believe: (1) that the administrative

portion of Dr. Robertson's job is one of the major reasons why his position existed in the first place; (2) that Dr. Robertson, as a neurologist was one of the few employees at the NMC to whom those administrative duties could have been distributed; and (3) that the highly specialized administrative portion of the job could not be transferred to someone without expertise in that area without destroying the utility of the job altogether.[1] Indeed, Dr. Robertson's own definition of a neurologist stated that studying and analyzing tests and blood work were part of what defined the job. Accordingly, we agree with the district court's determination that no factual dispute exists as to the essential functions of Dr. Robertson's job.

Next, we must address whether Dr. Robertson could perform this essential part of his job with the aid of

---

[1] The Code of Federal Regulations provides that,

> (2) A job function may be considered essential for any of several reasons, including but not limited to the following:
>
> (i) . . . because the reason the position exists is to perform that function;
>
> (ii) . . . because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
>
> (iii) the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform that particular function.

29 C.F.R. § 1630.2(n)(2).

"reasonable accommodations." In support of his argument, Dr. Robertson has proposed, among other things, either a part time position, no call duty, that he be allowed to treat his ADHD with medication, or that a clerical assistant could be hired to oversee his administrative duties.

We agree with the district court's conclusion that "[c]onsidering the limitations on plaintiff's abilities caused by ADHD, the type of work he is engaged in, the interests of NMC in running its business, and most importantly, the safety of the patients at NMC . . . plaintiff cannot establish a prima facie case that he could continue in his position as a neurologist because accommodation is not possible in these circumstances." Order and Reasons, October 9, 1997, at 32.

First, the ADA does not require an employer to relieve the employee of any essential functions of the job, modify the actual duties, or reassign existing employees or hire new employees to perform those duties. As this court has stated in describing what is required of an employer for accommodation purposes, "the law does not require an employer to transfer from the disabled employee any of the essential functions of his job." Barber v. Nabors Drilling U.S.A., Inc., 130 F.3d 702, 709 (5th Cir. 1997); accord Riddle v. Louisiana Power & Light Co., 654 So.2d 698, 701 (1995). Also, when the Barber Court was confronted with a similar request to what has been suggested by Dr. Robertson as a reasonable accommodation--here the hiring of an administrative assistant, the court responded: "[w]e cannot say that [the

disabled] can perform the essential functions of the job with reasonable accommodation, if the only successful accommodation is for [the disabled] not to perform those essential functions." Id. Likewise, we conclude that the ADA does not require NMC in this case to transfer any of the essential functions of Dr. Robertson's job to an assistant or to anyone else. If he can't perform the essential functions of his job absent assigning those duties to someone else, (e.g., having someone else perform his job) then Dr. Robertson can not be reasonably accommodated as a matter of law. See generally Reigel v. Kaiser Foundation Health, 859 F.Supp. 963 (E.D.N.C. 1994) (holding that physician's request for re-assignment to part-time position, position with no call duty or position of supervision, all of which would have depleted the group's physicians by one and increased the administrative ***296** staff by one, was not a reasonable accommodation).

Second, the ADA does not require an employer to accommodate an individual if the employee would pose a direct threat to the health and safety of others. See 42 U.S.C. § 12113(b); Turco v. Hoescht Celanese Corp., 101 F.3d 1090 (5th Cir. 1996). Based on his own testimony that he was concerned for his patients' safety, Robertson posed a "direct threat" to the health and safety of others in the workplace. Robertson's short-term memory problems had already caused various mistakes to be made in patients' charts and in dispensing medicine. Most significantly, Robertson voiced his own concerns about his ability to take care of patients, stating that it was only a matter of time before he seriously hurt someone. In light

of this evidence, we agree with the district court's conclusion that any accommodations in this case would be unjustified from the standpoint of the basic medical safety of Dr. Robertson's patients.

Third, Dr. Robertson mischaracterizes the decision to take or not to take medication for his condition as an accommodation option available to NMC. Because this personal decision rests solely with Dr. Robertson, NMC was not in a position to "accommodate" him in this way. Thus, we find this argument wholly without merit.

Therefore, after a review the record before us in a light most favorable to the Robertsons, we conclude that no issue of material fact remains on whether Dr. Robertson was a "qualified individual" under the ADA. The district court was correct in granting summary judgment in favor of NMC.

B. Remand of Pendent State-law Claims

Next, we turn to NMC's cross-appeal challenging the district court's remand of the Robertson's claims under the LDA. Under the doctrine of pendent jurisdiction, a federal court has the constitutional power to hear a state law claim if it is closely related to another federal claim. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). However, it is clear that a district court has wide discretion to refuse to hear a pendent state law claim. See 28 U.S.C. § 1367(c)(3); United States v. Capeletti Bros., Inc., 621 F.2d 1309, 1317-18 (5th Cir. 1980). We will therefore reverse a district court's decision to remand pendent state law claims after dismissing all remaining

federal claims only upon a finding of abuse of this "wide" discretion. See Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 585 (5th Cir. 1992). The Supreme Court identified certain circumstances that should persuade a court to dismiss a state claim: "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." United Mine Workers, 383 U.S. at 726, 86 S.Ct. 1130. As such is the situation in this case, we hold that the district court did not abuse its wide discretion in refusing to hear the Robertson's claims under the LDA.

III. Conclusion

For the foregoing reasons, we AFFIRM.

II. District Court's Judgment Signed December 3, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JAMES M. ROBERTSON,
M.D. AND VICTORIA
ROBERTSON

VERSUS CIVIL ACTION NO: 95-1851-"A"

THE NEUROMEDICAL
CENTER, THOMAS JUDGE JOHN V. PARKER
B. FLYNN, JOHN R.
CLIFFORD, ANTHONY
S. IOPPOLO, ALLEN MAGISTRATE A-1
S. JOSEPH, THOMAS
P. PERONE, L. ALLEN
PROCTOR, OSCAR L.
ROGERS, III, CAROLYN
C. BAKER, SUSAN L.
SCARBERRY AND BARBARA
J. GOLDEN

FINAL JUDGMENT IN ACCORDANCE WITH
RULE 54B

This matter came before the court on a Motion for Summary Judgment filed by the defendants. On October

9, 1997, the Court entered its Order and Reasons which granted the Motion for Summary Judgment as to the claims arising under the Americans with Disabilities Act, but decided fewer than all of the claims. The Court has now determined that there is no just reason for delay of entry of judgment, even though fewer than all of the claims have been decided, and the Court enters its final judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein granting the defendants' Motion for Summary Judgment as to the claims arising under the Americans with Disabilities Act.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the remaining state law claims are remanded to the State court for further proceedings.

JUDGMENT RENDERED on the 9th day of October, 1997.

JUDGMENT READ AND SIGNED at New Orleans, Louisiana, this 3rd day of December, 1997.

s/ Peter Beer

JUDGE, U.S. DISTRICT COURT

s/ Michele W. Crosby

MICHELE WHITESELL CROSBY, #20152
J. Rodney Ryan, Jr., #11561
Jones, Walker, Waechter, Poitevent, Carrere & Denegre
8555 United Plaza Blvd., 5th Floor
Baton Rouge, Louisiana 70809
Telephone: 504-231-2092

III. District Court's Judgment Signed December 1, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JAMES M. ROBERTSON,
M.D. AND VICTORIA
ROBERTSON

VERSUS CIVIL ACTION NO: 95-1851-"A"

THE NEUROMEDICAL
CENTER, THOMAS JUDGE JOHN V. PARKER
B. FLYNN, JOHN R.
CLIFFORD, ANTHONY
S. IOPPOLO, ALLEN MAGISTRATE A-1
S. JOSEPH, THOMAS
P. PERONE, L. ALLEN
PROCTOR, OSCAR L.
ROGERS, III, CAROLYN
C. BAKER, SUSAN L.
SCARBERRY AND BARBARA
J. GOLDEN

FINAL JUDGMENT IN ACCORDANCE WITH RULE 54B

This matter came before the court on a Motion for Summary Judgment filed by the defendants. On October

9, 1997, the Court entered its Order and Reasons which granted the Motion for Summary Judgment as to the claims arising under the Americans with Disabilities Act, but decided fewer than all of the claims. The Court has now determined that there is no just reason for delay of entry of judgment, even though fewer than all of the claims have been decided, and the Court enters its final judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein granting the defendants' Motion for Summary Judgment as to the claims arising under the Americans with Disabilities Act.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the remaining state law claims are remanded to the State court for further proceedings.

JUDGMENT RENDERED on the 9th day of October, 1997.

JUDGMENT READ AND SIGNED at New Orleans, Louisiana, this 1st day of December, 1997.

s/ Peter Beer

JUDGE, U.S. DISTRICT COURT

s/ Michele W. Crosby

MICHELE WHITESELL CROSBY, #20152
J. Rodney Ryan, Jr., #11561
Jones, Walker, Waechter, Poitevent, Carrere & Denegre
8555 United Plaza Blvd., 5th Floor
Baton Rouge, Louisiana 70809
Telephone: 504-231-2092

IV. District Court's Order and Reasons

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JAMES M. ROBERTSON, ET AL * CIVIL ACTION

VERSUS * NO. 95-1851

THE NEUROMEDICAL CENTER, ET AL * JUDGE PETER BEER

ORDER AND REASONS

This matter is before the Court on defendants' motion for summary judgment. For the following reasons, defendants' motion is granted as to the claims arising under the Americans with Disabilities Act, but denied in all other respects. The remaining state law claims are hereby remanded to state court for further proceedings.

Facts

Plaintiff, Dr. James Robertson, had been neurologist at the Neuromedical Center (hereafter "NMC") in Baton Rouge since 1981. He was a shareholder in the NMC corporation and was working under an employment contract with NMC. In May 1994, at the suggestion of one of his colleagues, plaintiff was tested and diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Approximately four months later, he was terminated from his employment with NMC. Plaintiff contends that he was wrongfully terminated because of his diagnosis of ADHD and that reasonable

accommodations were recommended, but never implemented. Defendants contend that plaintiff's work-related problems predated his diagnosis of ADHD, and those problems resulted in his termination "for cause" as provided in his employment contract.

Plaintiff filed suit against NMC and various individual doctors in state court alleging violations of the Americans with Disabilities Act as well as breach of contract, loss of consortium, wrongful termination, tortious interference with a contract and intentional infliction of emotional distress.[1] Defendants removed the case to federal court on the basis of the ADA claim. The Court concludes that in the absence of a genuine issue of material fact, summary judgment on the ADA claim is appropriate. Fed. R. Civ. P. 56(c).

---

[1] Mrs. Robertson also claims loss of consortium and breach of contract.

Plaintiffs brought suit against NMC and several individual doctors. The ADA states that "No covered entity shall discriminate against a qualified individual with a disability . . . . 42 U.S.C. § 12112(a). A "covered entity" is an employer, employment agency, labor organization, etc. An employer is a person engaged in an industry affecting commerce and any agent of such person. 42 U.S.C. §l2111(5). There is no individual liability under Title VII or the ADEA, so likewise, there should be no individual liability under the ADA. U.S. EEOC v. AIC Security Investigations, 55 F.3d 1276 (7th Cir. 1995). Accordingly, on that basis plaintiffs' claims against the individual defendants arising under the ADA are dismissed.

ADA CLAIM

The ADA expansively prohibits discrimination in employment against persons with a disability, providing that, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

To prevail on an ADA claim, the plaintiff must prove 1) he has a "disability"; 2) he is "qualified" for the job; and 3) an adverse employment decision was made solely because of his disability. Rizzo v. Children's World Learning Centers, Inc. 84 F.3d 758, 763 (5th Cir. 1996).

A. IS PLAINTIFF DISABLED?

A "disability" is a physical or mental impairment that substantially limits one or more of the major life activities of such individual. 42 U.S.C. § 12102(2). In this case, there is no dispute that plaintiff has been diagnosed with ADHD. For purposes of this summary judgment motion, defendants stipulate that ADHD is a disability that substantially limits plaintiff's ability to work.[2]

---

[2] Defendants contend that they decided to fire plaintiff at a meeting which took place on August 15, 16 days prior to the date when Robertson formally notified his employer of his diagnosis, and at that time, they had no knowledge of the "diagnosis" of ADHD. Thus, according to defendants, the adverse employment action could not have been based "solely" on plaintiff's diagnosis

B. IS PLAINTIFF A "QUALIFIED INDIVIDUAL"?

A "qualified individual with a disability" is one who can perform the essential functions of his job with or without reasonable accommodations. 42 U.S.C. § 12111(8).

Plaintiff claims that he is qualified because he is able to perform the essential functions of his job with reasonable accommodation. Plaintiff argues that issues of fact exists as to whether the administrative portion of his job is an "essential function" and whether he could be reasonably accommodated.

ESSENTIAL FUNCTIONS

The Code of Federal Regulations provides that,

> (2) A job function may be considered essential for any of several reasons, including but not limited to

---

of ADD.

Plaintiff states, however, that defendants were aware of his disorder well before the August meeting and provide evidence that another doctor at the clinic, upon examining plaintiff's daughter for ADD, stated in her notes that "the father probably has ADD."

The ADA does not require the employer to be aware of a "diagnosis." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. 29 C.F.R. 1630.2(j). Thus, it is not necessary for NMC to be formally notified of a diagnosis; and, for purposes of this order, the court will presume that the defendants were aware of the limitations caused by plaintiff's disability.

the following:

> (i) The function may be essential because the reason the position exists is to perform that function;
>
> (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
>
> (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

29 C.F.R. § 1630.2(n)(2).[3]

In support of his contentions, plaintiff cites the fact that prior to his termination, there were no written job descriptions. In addition, he relies on conflicting lists of reasonable accommodations developed by his treating physician, Dr. Stephen Cavalier, and a co-worker, Dr. Joseph to establish that the essential functions of his position

---

[3] Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

29 C.F.R. § 1630.2(n)(3).

were undefined.

This evidence, however, does not create an issue of fact as to whether the "administrative portion" of his job is essential. Rather, the evidence overwhelmingly establishes that it is. In his complaint, plaintiff states that "he began to have a minor amount of difficulty with routine paperwork and charts." The record is replete with letters and memoranda reprimanding Robertson for failure to complete patients' charts and timely interpret test results. In fact, Robertson often lost hospital privileges as a result of these problems. (See Attachments to Plaintiff's Exhibit J).[4] The dictionary description of a "neurologist" submitted by plaintiff states that a neurologist: "Orders and studies results of . . . patient's blood . . . . [P]rescribes and administers medication and drugs. Orders and studies results of electroencephalograms or x-rays . . . . (Plaintiff's opposition memorandum, page 12). Clearly, plaintiff's own evidence suggests that interpreting test results is part of his job. Accordingly, the court finds that there is no valid factual dispute as to the essential functions of his position. To take this a step further, the Court would be very concerned that any acceptance of plaintiff's attempts to minimize the overall record keeping and record referencing aspects of his professional activity - so necessary and important in this particular field of medicine - would be a serious oversight

---

[4] Defendant related other instances of unacceptable behavior by Robertson. Robertson attributes this behavior, not to his ADHD but to "manic behavior" resulting from the drug he was taking for ADHD.

and indeed, plain error.

Having determined that no material factual dispute exists as to the essential functions of plaintiff's position, the Court must next consider whether plaintiff is "qualified" to perform those functions in light of his disability. In that vein, the Court is persuaded by plaintiff's statements to his insurance carriers. Plaintiff has applied for and is receiving total disability benefits from private insurance carriers. To receive disability benefits, plaintiff and his physicians have certified to these insurance carriers that plaintiff is unable to perform any type of work for compensation because of ADHD.

Several courts have considered the role of disability benefits in ADA claims. In instances whether the plaintiff has pursued benefits from Social Security Administration, the Fifth Circuit has concluded that the receipt of such benefits creates a rebuttable presumption that the claimant is judicially estopped from asserting that he is a qualified individual with a disability. Cleveland v. Policy Management Systems, 120 F.3d 513, 518 (5th Cir. 1997).

The Fifth Circuit has not addressed a situation in which private insurance disability benefits are sought. Although judicial estoppel is not at issue in such cases, the certification of total disability to those insurance companies is the same as that which would be made to the Social Security Administration. Other courts have considered statements to insurance companies to be binding admissions that the plaintiff could not perform the essential functions of the job. Whitbeck v. Vital Signs, Inc., 943 F. Supp. 9, 14 (D.D.C. 1996); August v. Offices Unlimited, Inc., 981 F.2d

576, 582-84 (lst Cir. 1992); Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768, 771 (8th Cir. 1987), cert. denied., 485 U.S. 938 (1988); Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F. Supp. 963, 970, 976 (E.D.N.C. 1994) ("Plaintiff in the case sub judice cannot speak out of both sides of her mouth with equal vigor and credibility before this court. . . . by claiming she was physically willing and able to work during the same period of time that she was regularly collecting disability payments on her assertions that she was physically unable to work."). These courts have held that plaintiff's representations of total disability to insurance carriers, by itself, is enough to conclude that plaintiff was not a "qualified individual with a disability." See Hatfield v. Quantum Chemical Corp., 920 F. Supp. 108, 110 (S.D. Tex. 1996).

Plaintiff claims, however, that he became severely depressed as a result of his termination, which combined with ADHD, rendered him totally disabled. (Plaintiff's opposition memorandum, exhibit C).[5] However, there is no evidence

---

[5] Plaintiff contends that there is a genuine issue of fact as to whether he could perform his duties on the date of termination and that the disability insurance claim forms are not probative of this issue because they state that the disability started the day he was terminated. The court emphatically does not agree. The Missouri case cited by plaintiff states that: "Appellant's statements in the record that he was capable of performing the duties of his job and was performing those duties until the date he was terminated, and his statements that the termination caused him severe depression which is a major aspect to

that Robertson sought disability benefits or an accommodation for depression, or even notified NMC that this was a cause of his disability. In fact, in numerous forms filed with plaintiff's disability carriers, plaintiff and his physician certify that plaintiff's diagnosis is ADD, that his symptoms are "decreased memory, poor attention and focusing ability, some paresthesia", and that his occupational restrictions are "unable to concentrate, focus or remember, difficulty with analyzation and problem solving."[6] (Defendants' reply memorandum, Exhibit 1). These documents make no mention of depression. Plaintiff, in correspondence to his treating physician, states that he received "full disability for ADD only with no mention of a

---

was terminated, and his statements that the termination caused him severe depression which is a major aspect to his total disability, indicate that there is a genuine issue as to the material fact of whether appellant was capable of performing his job duties." Dafron v. McDonnell Douglas Corp., 874 S.W. 2d 483, 488 (Mo. Ct. App. 1994). There, plaintiff's depression was "a major aspect to his total disability." Here, the only indication that plaintiff's claimed disability was caused or aggravated by depression is his own self-serving affidavit which the Court must reject.

[6] In fact, the Insured's Statement of Total Disability contains a notification that it is fraudulent to fill out the form with false information or to omit important facts. To do so could subject the plaintiff or his attending physician to an insurance fraud investigation.

bipolar disorder."[7] (Defendants' reply memorandum, Exhibit 2). In addition, plaintiff testified in his deposition that he is "never going to practice neurology again . . . because [he] has ADD." (Plaintiff's deposition, page 155). Plaintiff makes no mention of depression as the cause of his disability, until now.

Plaintiff's continuous and unequivocal representations to his insurance carriers that he is totally disabled because of ADD, combined with his deposition testimony, preclude him from now asserting that the cause of his disability is depression. Plaintiff sought accommodation due to ADD while he was employed; when he was terminated, he sought and received disability benefits due to ADD. This evidence clearly establishes that plaintiff is totally disabled from practicing neurology.

REASONABLE ACCOMMODATIONS

Although the Court is convinced that plaintiff is not a qualified individual with a disability as discussed above, the Court will nonetheless consider whether plaintiff can be reasonably accommodated.

---

[7] In correspondence to his insurance carriers, Robertson states that he did not become depressed until he was fired from his job. However, he did not indicate that this depression was the cause of his disability. (Defendants' reply memorandum, Exhibit 2). Plaintiff and one of his insurance companies were disputing whether plaintiff suffered from ADHD or a bipolar disorder. The latter diagnosis would have limited the amount of his disability benefits.

Plaintiff contends that NMC refused to negotiate a set of reasonable accommodations and that whether accommodation is possible is an issue of fact. Defendants claim that plaintiff's proposed accommodations were unreasonable and that NMC is not required to accommodate plaintiff because he would pose a direct threat to the health and safety of others.

The ADA prohibits an employer's failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A).

> Reasonable accommodation may include-
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

The regulations define reasonable accommodations as "[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held

or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii) (1996). The ADA does not, however, require an employer to relieve the employee of any essential functions of the job, modify the actual duties, or reassign existing employees or hire new employees to perform the duties. Additionally, it does not require anything that would pose an undue hardship, i.e., significant difficulty or expense, on the operation of the business. 42 U.S.C. §§ 12112(b)(5)(A) and 1211(10)(A), and does not require the business to fundamentally alter its program or to find or create a new job for the individual. Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 1995).

Considering the limitations on plaintiff's abilities caused by ADHD, the type of work he is engaged in, the interests of NMC in running its business, and most importantly, the safety of the patients at NMC, the Court concludes that plaintiff cannot establish a prima facie case that he could continue in his position as a neurologist because accommodation is not possible in these circumstances.

Defendants claim that plaintiff's proposed accommodations were unreasonable because he was asking for a part time position, no call duty, and other concessions without a reduction in pay. Plaintiff argues that a reduction in pay would be automatic because he would have fewer patients. Plaintiff contends that NMC refused to negotiate a set of reasonable accommodations and whether accommodation was possible is a question of fact.

In this case, there is substantial evidence that

plaintiff's proposed accommodations were unreasonable. See Reigel v. Kaiser Foundation Health, 859 F. Supp. 963 (E.D. N.C. 1994). There, a physician's request for restricted duties would have depleted the employer's physicians by one and increased its administrative staff by one. Here, regardless of the compensation issue, to reduce plaintiff's hours, limit his call duty and assign additional staff to help with administrative work would create more work for the other physicians who took over his call duty, and would require NMC to assign or hire an administrative assistant to help him with his paperwork. Even so, an assistant would not be able to interpret the test results or complete patient charts as is required of the neurologists at NMC. Accordingly, the Court concludes that the evidence does not in any way support a finding that accommodation in this case is possible.

DIRECT THREAT

More importantly, the ADA does not require the employer to accommodate an individual if the employee would pose a direct threat to the health of safety of others. 42 U.S.C. § 12113(b). (See Turco v. Hoescht Celanese Corp., 101 F.3d 1090 (5th Cir. 1996)). Based on plaintiff's own testimony that he was concerned for his patients safety, Robertson posed a "direct threat" to the health and safety of others in the workplace. Robertson's short-term memory problems already caused mistakes to be made in patients charts and mistakes in dispensing medicine. (Robertson deposition, pages 198-199). Most significantly, Robertson voiced his own concerns about his ability to take care of patients, stating that it was only a matter of time before he

seriously hurt someone. (Robertson deposition, page 154-157). In light of this evidence, the court finds that accommodation in this case would be unjustified from the standpoint of basic medical safety of the patient such that consideration of all other aspects of plaintiff's ADA claim is superfluous.

In sum, plaintiff is not a qualified individual under the ADA because he cannot perform the essential functions of his job and no accommodation could be devised which would compensate for his particular disability. Accordingly, for the foregoing reasons, the Court grants defendants' motion for summary judgment in part, dismissing plaintiff's claims arising under the Americans with Disabilities Act, and remands the remaining claims to state court for further proceedings.

New Orleans, Louisiana, this 9th day of October, 1997.

s/Peter Beer

Peter Beer

United States District Judge

V. Statutes and Regulations Involved

UNITED STATES CODE
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126--EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

§ 12101. FINDINGS AND PURPOSE.

(a) Findings. The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers,

overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) **Purpose.** It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. DEFINITIONS. As used in this chapter:

(1) **Auxiliary aids and services.** The term "auxiliary aids and services" includes--

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) **Disability.** The term "disability" means, with

respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

SUBCHAPTER I--EMPLOYMENT

§ 12211. DEFINITIONS. As used in this subchapter:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity. The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer.

(A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include--

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs.

(A) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 *et seq.*]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of

section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc. The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include--

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship.

(A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include--

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. DISCRIMINATION.

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability

because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a) of this section, the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations

to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

. . .

§ 12113. DEFENSES.

(a) In general. It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards. The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

. . .

CODE OF FEDERAL REGULATIONS
TITLE 29--LABOR
CHAPTER XIV--EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1630--REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

§ 1630.2. DEFINITIONS.

(a) Commission means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management

committee.

(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) Employer--

(1) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not include--

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code

of 1986.

(f) Employee means an individual employed by an employer.

(g) Disability means, with respect to an individual--

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment. (See Sec. 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits--

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the

condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working--

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of ''working'':

(A) The geographical area to

which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See Sec. 1630.3 for exceptions to this definition).

(n) Essential functions--

(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term ''essential functions'' does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) Reasonable accommodation.

(1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed

by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(p) Undue hardship--

(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or

others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a ''direct threat'' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

§ 1630.9. NOT MAKING REASONABLE ACCOMMODATION.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to

such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 506 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

(d) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

§ 1630.15 DEFENSES. Defenses to an allegation of discrimination under this part may include, but are not limited to, the following:

(a) Disparate treatment charges. It may be a defense to a charge of disparate treatment brought under Secs. 1630.4 through 1630.8 and 1630.11 through 1630.12 that the challenged action is justified by a legitimate, nondiscriminatory reason.

(b) Charges of discriminatory application of selection criteria--

(1) In general. It may be a defense to a

charge of discrimination, as described in Sec. 1630.10, that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(2) Direct threat as a qualification standard. The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. (See Sec. 1630.2(r) defining direct threat.)

(c) Other disparate impact charges. It may be a defense to a charge of discrimination brought under this part that a uniformly applied standard, criterion, or policy has a disparate impact on an individual with a disability or a class of individuals with disabilities that the challenged standard, criterion or policy has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(d) Charges of not making reasonable accommodation. It may be a defense to a charge of discrimination, as described in Sec. 1630.9, that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity's business.

(e) Conflict with other Federal laws. It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another

Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

(f) Additional defenses. It may be a defense to a charge of discrimination under this part that the alleged discriminatory action is specifically permitted by Sec. 1630.14 or Sec. 1630.16.

VI. Letter from Dr. Cavalier Dated September 12, 1994

THE
BATON ROUGE CLINIC
AMC

September 12, 1994

The following Plan of Accommodation is recommended for James Robertson, M.D. with disability of ADHD (314.01-DSM IV):

1) Work schedule limited to four days per week.
2) Clinic schedule split - 9 a.m. to 12 noon
   2 p.m. to 4:30 p.m.
3) Hospital practice limited to one hospital - OLOL preferable.
4) Weekend call split with another physician - on call only Saturday or Sunday rather than both days.
5) Two ½ days per month scheduled for office catch up time.
6) Two FTE's in office - one clerical and one nursing.
7) Development of office visit forms that can be completed during time of visits (enclosed is a copy of one form used in our office).

8) Regular meetings with administrative staff to evaluate practice efficiency.

9) Office personal computer for help with organization/efficiency by computerized calender, schedule, reminders, etc.

Steven J. Cavalier, M.D.
Department of Neurology

SJC/khn

THE
BATON ROUGE CLINIC
AMC

RECOMMENDATIONS FOR DR. JAMES ROBERTSON

1) Evaluation and second opinion by a nationally recognized ADD expert.
2) Ongoing ADD education including courses, seminars, workshops, and support groups.
3) Attempt to increase partners information/awareness/sensitivity regarding ADD.

Steven J. Cavalier, M.D.
Department of Neurology

SJC/knn
9/12/94

VII. Memorandum to Dr. Flynn Dated September 26, 1994

September 26, 1994

To: Tom Flynn, M.D., Managing Partner
The NeuroMedical Center
From: Adult Neurology Department

Dear Tom:

We are writing to respectfully inform you of the current concensus (*sic*) which exists in our department regarding our working relationship with Jim Robertson. We have decided that a working relationship with him is unfeasible. We will move our practices elsewhere if it is necessary to continue a working relationship with Dr. Robertson.

The expectation of any neurologist is that of decision making. Decision making may involve daily "routine tasks". The "routine" tasks are nevertheless essential to a patients health and well being. In addition to the "routine" tasks, there are the extremely complex cases which come along frequently. It is the management of these complex cases that procrastination, indecision, and inattention could have the most critical consequenses (*sic*). We are not in a position to continually review Jim's decision making or to deal with his procrastination.

We need to make special mention regarding Jim's ability to perform nerve conduction and electromyographic studies. Recent review of his studies reveals unacceptable

quality. There are innumerable errors in his studies. There is inadequate documentation for his billings. Closer review of his work has become possible with his recent use of the Advantage EMG Machine. This machine records his work to both electronic media as well as a paper copy. Recent review by the members of the department reveals that he has only a very rudimentary understanding of EMG and NCV concepts.

Jim's obstructional behavior and lack of conformity is not acceptable. There is no trust in him. There is not one in the department that feels a trusting relationship can be reestablished. We are saddened by the circumstances that we face. Our decision has been made for the protection of our patients and the preservation of our group.

/s L. Allen Proctor, M.D.
L. Allen Proctor, M.D.
Adult Neurology Chairman

/s Carolyn C. Baker, M.D.
Carolyn C. Baker, M.D.

/s Oscar L. Rogers, M.D.
Oscar L. Rogers, M.D.

/s Susan Scarberry, M.D.
Susan Scarberry, M.D.